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# Demystifying Insurance Contracts in Kenya: An Explanatory Approach

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**Abstract**
If there is any subject globally that has been misunderstood, misinterpreted, misused, misjudged and misconceived, it is insurance and more so, insurance contracts. This paper attempts to demystify the subject of insurance in Kenya with special reference to insurance contracts. It not only highlights the difference between insurance and gambling, but also expounds the various types of insurable risks as well as breaking down and discussing the components of a valid insurance contract and the implications of breach of the same. The paper also touches on the basic principles of insurance universally recognized, including Utmost Good Faith (Uberrmae fides),Insurable interest, Proximate cause, Indemnity, Contribution and Subrogation, putting more emphasis on the fundamental principle of Uberrimae fides. The paper takes an explanatory approach to expound on the contract of insurance touching on offer and acceptance issues in detail, the proposal form and contents in various types of insurance, and finally explores the contentious issue of Material facts.
**Keywords:** Insurance contacts, Utmost good faith, insurable risks, proposal forms, life assurance, property insurance contra-proferentum rule.

## 1. Introduction

Insurance may be generally described as a device for the handling of some of the risks or chances of loss to which man is subject. Some people think that it is a wager or a gambling exercise. Insurance is not a wager (a gamble) because the risk of loss is not induced by the contract as in the case of a wager. In a wager, the "loss" is induced by the contract because it is the contract that creates the obligation to pay the amount agreed upon which would not have been payable if the agreement had not been entered into in the first place. In insurance, the risk of loss exists irrespective of the contract, and the contract only provides for the risk but does not create it. Insurable risks may be classified into: (a)Business risks – e.g. possible loss of goods by fire or theft and loss of business income by reason of periods of bad trade, (b) Personal risks – e.g. loss of income such as salary through an accident that renders it impossible for a person to continue with his usual occupation. Another example of personal risks is loss of income through a person's death (Ivamy, 1981).

The basic concept which underlies risk is that of uncertainty-something which may or may not happen. Risks are sometimes classified into dynamic or speculative risks. These are not insurable. They may also be static or pure risks – these are insurable because they are susceptible to the principles on which insurance is based such as Dynamic risks which include changes in fashion making, valuable unsalable stock (marketing risks), Variations in trading profit on account of circles of national prosperity and depression, labour disputes (which may mean loss of orders on a large scale), and political risks. Another type of insurable risk classification is Static or Pure risks such as death of a person or destruction of goods or other property by a peril such as fire, just to mention a few (Regda, 2004)

## 2. The Contract of insurance

According to Prof. Ivamy, "A contract of insurance in the widest sense of the term may be defined as a contract whereby one person, called the **insurer**, undertakes, in return for the agreed consideration, called the **premium**, to pay to another person, called the **assured**, a sum of money, or its equivalent, on the happening of a specified event." (Ivamy, 1981). It was judicially defined by Lawrence Judge in LUCENA Vs CRAUFURD as, "a contract by which the one party in consideration of a price paid to him, adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them." To be an enforceable agreement, a contract of insurance must contain the following essential elements of a contract:Offer and acceptance,Consideration,Legal purpose (legality),Competent parties( i.e. capacity) and Legal form (Regda, 2004).

*2.1 The offer* – Since the contract of insurance is constituted by the acceptance of an offer, it is necessary in the first instance, to make certain that an offer has in fact been made which is capable of being accepted. To constitute an offer capable of being accepted, the following conditions must be fulfilled: The alleged offer must be intended by the party thereby it to be an offer. The party who begins the negotiations does not necessarily make an offer thereby; he merely indicates his readiness to consider an offer, the alleged offer must be complete. It must show with precision the contract into which the party making it is prepared to enter, (ref. Scamwel & Nephew Vs.

 

Oustin),the alleged offer must be communicated to the other party. In Rose Vs. medical Invalid Life assurance society, (1948), the insurer stated in a letter handed to their own agent the premium at which they were willing to accept the proposal. The agent did not hand over the letter to the proposed assured. It was held that there was no contract of assurance, and also, the alleged offer must be in force at the time when the other party pupports to accept it. An offer may be revoked before acceptance; and an offer once revoked ceases to be in force and cannot afterwards be accepted unless it is repeated (see Hyder Vs Wrench).

*2.1.2 Who makes the insurance offer?*

The offer to enter into a contract of insurance may, as a general rule, be considered as addressed to the insurers by the person who is seeking to protect himself by insurance against the loss. He may have been invited by the insurers to put himself into communication with them; but, whether the invitation comes to him from the insurers direct, or through the medium of an agent, or whether it is given to him personally or only as a member of the public through an advertisement, the position remains unchanged, and he must submit his proposal, which they may accept or decline at their own pleasure. The offer therefore proceeds from the proposed assured when he has filled a document usually called, "the proposal form", and forwarded it to the insurers. The terms of an ordinary contract of insurance are not specially arranged between the parties. The insurers have their own terms upon which they are prepared to contract and from which they are not willing to depart. There is no new negotiation between the parties, the assured being compelled to contract with the insurers upon their terms. There is therefore no difficulty in an ordinary case in ascertaining from whom the offer precedes (Regda, 2004).

*2.1.3 The proposal form - the Usual contents of proposal forms*

Proposal forms vary in their content according to the nature of the proposed insurance and also according to the practice of different insurance. All proposal forms however contain questions which the proposed assured is required to answer, and these questions, whatever the nature of the insurance, are framed on the same general lines. The matters to which the questions relate may be classified as follows: The description of the proposed insured/assured, the description of the risk to be insured/assured, the description of circumstances affecting the risk, the previous history of the proposed insured/assured (Kothari & Bahl, 1993).

## 3. Questions asked in various types of insurance

### 3.1 Life Assurance

The proposer is required to give his name, his present residence and occupation and to state whether he is married or single and also the date and place of birth. An important question relates to the previous proposals for life assurance which may have been made to the company concerned or to another insurance company (ref. LONDON ASSURANCE Vs. MANSEL). The proposer has to say whether such a proposal has ever been declined, delayed, withdrawn, or accepted at an extra premium. It is usual for the insurance company to ask whether he has ever resided abroad, and, if so, when and for how long, and whether his health was in any way affected. He may be asked whether he has any intention of going abroad, and, if so, where and for what purpose and for how long. A question of particular importance which he is required to answer is whether he has suffered from any disease or had any accident requiring medical attention. Usually this question is limited to a period e.g of 5 years before the submission of the proposal. The proposer will have to supply the insurance company with the names and addresses of the medics whom he has consulted (Jess, 2011).

Another question refers to the possibility of the proposer engaging in aviation or other hazardous pursuits. If he intends to travel on any regular air route, he will usually have to state to what part of the world he intends to travel. The proposer has to state whether there are any circumstances not referred to in the previous questions which bear upon the suitability of his life for insurance. The proposer, on completion of the proposal form questions, has to sign the declaration whereby he declares that he's at present in good health, not afflicted with any disease or disorder tending to shorten life and that his answers to the questions are true. He further agrees to answer any questions put to him by a doctor appointed on behalf of the insurance company regarding his health. Further, he has to state that he will not withhold any circumstances tending to render an assurance on his life more than usually hazardous. Finally, he agrees that the answers to the questions and the declaration and the answers given to the doctor who is acting on behalf of the insurance company, are to be the basis of the contract – "basis clause", and that if any untrue statement has been or will be made, or if any information necessary to be made known to the company has been or will be withheld, all sums which have been paid to the company will be forfeited and the insurance policy will be null and void (Lowry & Rawlings, 2004).

*3.1.2 Personal Accident insurance*

The proposer must state his name in full, his residence and business address, occupation, age, height and weight. He must state whether he is at present in good health and whether he ordinarily enjoys good health. He must disclose whether he's ever had any physical defect and infirmity, whether his sight or hearing has in any way been impaired, or whether he has suffered from any disease of the eye or ear. A question also asks him whether he has ever had any fit of any kind, or paralysis, or whether he has suffered from certain diseases e.g. pneumonia. Another question asks him whether he has had smallpox or ever been vaccinated. He will have to say whether he has at any

 

time or times in the recent past, e.g. the last 5 years, been incapacitated by accident or illness from following his occupation for more than a week at time. If he has been away from work, he has to give particulars. He has to state the name and address of his usual medical attendant. The insurance company will want to know whether he is of sober and temperate habits, whether he plays football, engages in mountaineering, aviation, or gliding. The proposer will have to say whether there are any circumstances connected with his occupation, which render him especially liable accidents or diseases. He will have to say whether any previous proposal of accidents has been declined, or not proceeded with, and whether he has ever e any insurance cancelled or discontinued or its renewal refused. He must supply the insurance company with full particulars of any claim made under any accident insurance policy. The proposal form usually ends by a declaration in the form similar to that described above in the case of life insurance, which has to be signed by the proposer (Jess, 2011).

*3.1.3 Fire Insurance*

In the case of fire insurance, the proposer has to state his name and address & in the case of a firm names and addresses of all the parties or in the case of a limited company, the names and addresses of all the directors. The business or profession must be given together with the situation of the property to be insured. The proposer has to describe the property to be insured with the amount in respect of each item. He has to say how the building proposed to insured is lighted, heated, and protected against fire. He must disclose whether any manufacturing process or any hazardous trade is carried out in the building or near it. If the property or any part of it is already covered by insurance against fire, the details of such insurance must be given (Kothari & Bahl, 1993). There is always a question whether a previous proposal for fire insurance has ever been made by or on behalf of the proposer, or ever been declined, or accepted at an increased rate of premium. Sometimes the proposer is asked whether a proposal in respect of any type of insurance policy has ever been declined and whether any insurance policy which has been affected by him has ever been cancelled or discontinued. It is also required to state whether any property belonging to him has ever been destroyed by fire. The proposer is also asked whether there is any other fact within his knowledge which are material to the insurance proposed. If so, he must give particulars of them. The proposal form ends with a declaration, which has to be completed by the proposer, and is similar to those mentioned above in other types of insurance.

*3.1.4 Burglary Insurance*

The proposer will have to give his name and address in full, and his occupation, and in the case of some proposal forms, he will have to state his nationality of origin. He must give a full description of the premises which are to be insured, together with their rental charges and a statement as to how long the premises have been occupied by him, whether he is the sole occupier, and whether the premises are left unoccupied at any time. According to (Jess, 2011), an important question relates to the security of the premises, e.g. how the outer doors are secured, and whether the windows on the ground floor are protected. In the case of insurance of business premises, the proposer will have to say whether he keeps a stock book and where it is left at night, and whether all valuables are put in a safe when the premises are closed. The insurance company will want to know whether the premises have ever been entered by thieves, and what precautions have been taken to prevent a recurrence. As in the case of other types of insurance, the proposer will have to give details of previous proposals being declined and the details of any claims which he has made. A declaration which he has to sign says that he declares that all answers and particulars which he has given are true, and that the amount proposed for insurance represents to the best of his knowledge and belief, the full value of the articles to be insured, and he undertakes to exercise all ordinary and reasonable precautions for the safety of the property. He agrees that the declaration shall be the basis of the contract between him and the company (Jess, 2011).

*3.1.5 Motor Insurance*

The proposer will have to give his name, address and occupation in full. The particulars of the vehicle to be insured e.g. the maker's name, registration details, number of seats, year of manufacture, date of purchase, the original cost, estimated present value, chassis and engine numbers etc. he must say whether the vehicle is used solely for private purposes, and he will be the sole driver. His age must be given and any details of any physical defects from which he suffers. The insurance company will want to know whether he has ever been involved in an accident in the vehicle to be insured, and whether he has ever made any claims in connection with any other motor vehicle. The proposer will be asked whether he has ever been convicted in respect of any offence in relation to the driving of motor vehicles or had his license endorsed. Sometimes this question is extended in its scope so that the proposer will have to give the details of any previous convictions of those persons whom he expects will drive the vehicle. He is also asked whether any insurance company has declined his proposal or required an increased premium or imposed special conditions, or cancelled or refused to renew his policy. He then has to sign a declaration, stating that the answers he has given are true and that he agrees that the declaration shall be the basis of the contract (Levine & Haar QC, 2004).

**3.2 The effects of the proposal form**

The proposal form, when duly filled in and signed by the proposed assured, and forwarded to the insurers, operates

 

as a formal offer from the proposed assured to the insurers to enter into a contract of insurance. The proposal form shows the terms upon which he is willing to contract, and if the offer is accepted, he cannot insist upon having an insurance differing in its terms from those specified in the proposal. Since the proposal form, in practice, proceeds from the insurers, it further shows the terms upon which they too are willing to contract. They are bound therefore, after acceptance to issue a policy in accordance with the proposal (ref. GENERAL ACCIDENT INSURANCE CORPORATION Vs. CRONK (1901)) - in which it was held that the assured must be taken to have applied for an accident insurance policy in the ordinary form issued by the insurers (Lowry & Rawlings, 2004).

*3.2.1 The purpose of the Cover Note*

A proposal is not necessarily accepted at once since the insurance company may take time to consider it. If the proposal is submitted through an agent, the agent usually has no authority to accept it himself, but must forward it to the issuers in order that they may decide whether to accept it or not. There is therefore, as a rule, an interval of time between the making of the proposal and the final decision, so it is the practice of insurance companies in the case of some types of insurance, especially motor, burglary and fire insurance, to give the proposer protection by the issue of a cover note. The cover note is issued at once on receipt of a proposal and covers the assured and puts the underwriters on risk for the period while the proposal is being considered and until a policy is neither granted or refused' per Pearson, J, in JULIEN PRAET ET CIE S/A Vs. H.G. POLAND LTD [1960]. If the agent has authority to accept the proposal without referring it to the insurance company, his acceptance completes the contract and his issue of a receipt for the premium will cover the proposer until the formal policy is prepared. The cover note is, in practice, printed in common form; it is usually signed on behalf of the insurance company by the agent through whom the proposal was submitted, and issued by him to the proposer. If the agent is entrusted with a number of cover notes in blank to be filled up and issued by him when required, he has the authority to give cover and the issue the cover note binds the company. In this case the company may be bound, even though the cover note is not in the precise form required by the agent's instructions provided that the variance is technical only, such as printing of the agent's signature instead of writing it and does not relate to matters of substance. In many cases the agent is not entrusted with cover notes in blank; but on each occasion when a proposal form is received from him, the company sends him a cover note with instructions to sign and issue it to the proposer. The agent's authority is then limited to the particular cover note; he has then no general authority to grant cover. No formal document is however necessary to bind the company. Cover may be given informally, by a letter from the head office. Even verbal cover is sufficient, and the verbal cover may be given by the agent submitting the proposal, if his authority thus far (Kothari & Bahl, 1993).

*3.2.2 The duration of the Cover Note*

The question of the duration of the cover note is of little importance where the proposal is accepted, since the cover note comes to an end when the policy is issued. In Mackie V European Assurance Company [1869], the judge stated that, until the proposal is accepted, the proposer may withdraw his offer, notwithstanding the issue of the cover note. The duration of the cover note is important where the proposal is not accepted. This may be determined as follows; First, where the cover note provides that it is to remain in force until the issuers intimate that they have rejected the proposal, it remains in force until the rejection is actually brought to the knowledge of the proposer; Rossiter V Trafalgar Life Assurance Association [1859] ; Mackie V European Assurance company (Levine & Haar QC, 2004)

Secondly, where the cover note is expressly stated to be in force for a fixed period; The insurers may reserve the right to terminate it at an earlier date by intimating their rejection of the proposal. In Mackie V European Assurance company, the cover note provided that, 'the property shall be held insured for one month from this date, unless the proposal be previously declined' the judge stated; 'It was competent for the office by return of post to decline the proposal without giving a reason, but until such notice was received, the insurance would continue, if a fire happened in the interval, this office would be answerable.' In Goodfellow V Times and Beacon Assurance Company, the cover note provided that the proposer should be 'within which time the determination of the board will be notified.' It was held that this was not an absolute insurance for 21 days, but that the insurers might, within that time, reject the risk and give notice, after which their liability would cease. It does not necessarily cease to be in force when the specified period has expired if the effect of its issue imposed upon the insurers certain duties towards the proposer which they must discharge they exonerated from further liability. In such a case, it is necessary to consider the terms in which the particular note is framed. For instance, where the cover note provides not only that the insures are to intimate their rejection of the proposal, but also that any deposit paid by the proposer is to be returned to him, subject to a deduction in expect of the days during which the cover note has been operating, the insures remain liable until they have fully discharged their obligation. Even where they have intimated their rejection of his proposal they remain bound to the proposer unless and until they have repaid him the balance of his deposit, in accordance to the terms of the cover note. In GRANT Vs. RELIANCE MUTUAL INSURANCE CO. (1879), the insurers by the terms of the cover note had to give 10 days' notice of their intention to terminate the insurance before the expiration of the cover note and also repay the premium. It was held that the insurance was not terminated unless the company both gave 10 days' notice and repaid the premium. A different scenario is

 

where the cover note expressly provides that the insurers are to intimate their acceptance of the proposal or that the proposed insurance is not to bind them until a policy is issued, the cover note will cease to have effect at the expiration of the specified period, unless such acceptance has been intimated or unless the policy has been issued, as the case may be. Usually a cover note expressly states the period for which it is to be in force e.g. "the insurance is provisionally held in force for 15 days from 9.30 am , July 29,1991". Difficulties may arise however if the period of cover is not specified. This may be illustrated by the decision in CARTWRIGHT V McCORMARK (1963) in which the facts briefly were as follows:

> *The insurance company had issued a temporary cover note granting the insured comprehensive motor car insurance. He was involved in a road accident at 5.45pm on Dec 17, and the question was whether the company was bound to identify him in respect of damages which he had had to pay to a motor cyclist who had been injured. The cover note issued to him by the company contained a column entitled 'EFFECTIVE TIME AND DATE OF COMMENCEMENT OF RISK' under the column the date was written 2/12/59. Another part of the note contained the words 'this cover note is only valid for 15 days from the commencement date.' Also included in the note was a statement that "under no circumstances is the time & commencement of risk to be prior to the actual time of issue of this cover note". The insurance company contended that it was not liable because the period for which the note had been issued had expired i.e that the period started at 11.45am on Dec 2,1959 and expired at 11.45am on Dec 17, 1959, six hours before the accident happened. It was held by the court of appeal (English) that the time did not begin to run until mid-night of Dec 2, and that consequently, the insured was entitled to be indemnified. Harman Lord Justice stated that the time of 11.45am was inserted to protect the company until that hour of the day, showing that it was not at risk until that time. The duration of the company's liability was expressed as 15 days from the commencement date. It was not 15 days from the commencement of the risk. The risk run from 11.45 am but the date of commencement was Dec 2. The note therefore expired 15 days from Dec 2, and those words excluded the first date and began at mid-night.*

*3.2.3 Replacement of the cover note by the policy*

The cover note is normally replaced in due course by a policy, but the insurance company is not bound to issue one, unless there is an agreement to that effect. The assured, too, is not bound to accept the policy. In Mackie Vs European Assurance Society, Malins, V-C stated; "During that month [i.e. when the cover note was in force] it was open to the company on further inquiry to refuse to grant the policy and terminate the contract at the end of the month, it was equally open to the assured to say that he did not like the company, not thinking the capital sufficient, or for other reasons".

**3.3 The Acceptance**

What constitutes an acceptance? There cannot be an acceptance so long as the terms of the contract of insurance are still under discussion, and the premium remains to be fixed, since there's no contract until complete agreement has been reached, and nothing remains to be done by either party except to perform what has been agreed. The offer therefore must be complete on the face of it and the acceptance must be in the very terms of the offer – in accordance with the rules of the common law relating to offer and acceptance.

*3.3.1 The methods of acceptance*

The methods of accepting the offer will depend on whether the offer is made by the proposer as it normally will be, or whether it is made by the insurer. Where the offer is made by the proposer, the final acceptance of a proposal may be signified by the insurers in one or other of the following ways: - By a formal acceptance which is unconditional, by the issue of a policy document, by acceptance of the premium, and by the conduct of the insurers. The issue of the policy is a conclusive intimation that the insurers have accepted the proposal. In Wright Vs. Sun Mutual Life Insurance Co. Ltd, it was explained that, if an insurance company by its constitution is bound to issue its policy documents under seal, a policy document issued without a seal may not be effective as a valid contract. Once the policy is issued the insurers are bound by their acceptance and will be stopped from alleging that there was no contract on the ground that no proposal had ever been signed (ref. Pearl Life Assurance Co. Vs. Johnson(1909)).

In the case of a policy under seal, the acceptance is completed by the execution of the policy. In Roberts Vs. Security (1897), Lopes, Lord Justice, stated; "the question we have to consider is whether there was a concluded agreement for insurance, or the matter had not gone beyond the stage of negotiation. In my opinion the policy, being duly executed, as it was, by the sealing and signature by the directors and secretary of the company, constituted a concluded agreement …in my opinion if the day after its being so executed, the plaintiff had tendered the premium and demanded the policy, there would be no answer to the demand." It is immaterial that the policy is retained by the insurers in their possession, and never handed over to the proposer, since no formal acceptance is required from him, nor need he take away the policy in order to complete the delivery. The policy, as an

 

enforceable contract of insurance, even though no premium has been paid at the time of the loss in respect of which the proposer seeks to enforce it. However, the person relying on the policy may be precluded from enforcing it in respect of any loss happening before he has complied with its conditions e.g by paying the premium, if such a condition was an expressed term of the policy. The issue of the policy is not however an acceptance where the assured does not treat the policy as an acceptance but continues the negotiations for the purpose of obtaining an alteration in its terms, as occurred in, Sickness and Accident Assurance association Vs. General Accident Assurance Corporation. Where the policy as issued departs from the proposal by introducing a fresh term thus constituting not an acceptance but a counter offer, the issue of the policy is not legally an acceptance. This was stated in; Allis-Chalmers co. Vs. Maryland Fidelity and Deposit Co. The introduction of a fresh term shows that the agreement is not yet complete since something remains to be done by the proposer to declare his adoption of it (Lowry & Rawlings, 2004).

*3.3.2 Acceptance of the premium*

Where no policy has been issued to the proposer before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive, may erase the presumption, in the absence of any circumstances leading to a contrary conclusion, that the insurers have definitely accepted his proposal. In such a case, they are not entitled to refuse to issue a policy to him, and they are therefore liable to him in the event of a loss.

*3.3.3 The conduct of the insurer*

Even where the premium has not been paid nor the policy issued, the facts may clearly show that the insurers have accepted the proposal, and that there is a binding contract between the parties, on the part of the proposer to pay the premium, and on the part of the insurers to issue a policy. Where this is the case, the insurers cannot refuse to accept the premium, and will be liable for a loss happening even before a policy is issued or the premium is paid. What facts constitute an acceptance on the part of the insurers will depend upon the circumstances of the particular case. A mere demand for the premium is sufficient. But mere delay in dealing with an application for insurance does not constitute an acceptance, unless it is the duty of the insurers to intimate their rejection promptly.

*3.3.4 The effect of the acceptance*

On the final acceptance of the proposal, the negotiations come to an end and the duty of disclosure ceases. The assured therefore is under no obligation to disclose any material facts which come to his knowledge or to correct any misrepresentation the inaccuracy in which is only discovered after the acceptance. An acceptance once given binds the parties and cannot be withdrawn except by mutual consent. It is immaterial that the parties have misapprehended their position and have cancelled the policy on the assumption that no contract exists between them.

**3.4 The principle of "Uberrima Fides"**

It is a fundamental principle of insurance law that the Utmost Good Faith (i.e Uberrima Fides) must be observed by each party. This rule was stated by Lord Mansfield in Carter Vs. Boehm (1766) as follows; "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake without any fraudulent intent, yet still the underwriter is deceived and the policy is void because the risk run is really different from the risk understood and intended to be run at the time of the agreement…the governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary…" The case of Carter Vs Boehm concerned a policy which had been taken out against the taking of a fort by a foreign enemy. But the principle of law stated there in by Lord Mansfield, was applied by Jessel, M.R. to London Assurance V Mansel which was a case concerning life assurance in which he stated: "As regards the general principle I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle".

*3.4.1 Non – disclosure*

The assured is under a duty to disclose all material facts relating to the insurance which he proposes to effect. The assured must disclose all material facts which are within his actual or presumed knowledge: *Actual knowledge* - The special facts distinguishing any proposed insurance are, as a general rule unknown to the insurers who are not in a position to ascertain them. They lie, for the most part, solely within the knowledge of the proposed assured. Good faith therefore requires that he should not, by his silence, mislead the insurers into believing that the risk as proposed does not differ to their detriment from the risk that they will actually run. On the contrary, he should help

 

them by every means in his power to estimate the risk at its proper value. This was stated by Fletcher – Moulton in Joel vs. Law union insurance. A failure on the part of the assured to disclose a material fact is sometimes called "concealment". Strictly speaking, however, the word implies the keeping back or suppression of something which it is the duty of the assured to bring specifically to the notice of the insurers, and not merely an inadvertent omission to disclose it. Hence where the failure to disclose is not due to design and the assured has no intention to deal otherwise than frankly and fairly with the insurers, the term, "non-disclosure" may perhaps be appropriate. Every contract of insurance proceeds on the basis that the duty of disclosure has been discharged by the proposed assured and the failure to discharge it renders the contract voidable at the instance of the insurer. *Presumed knowledge* - The duty of making disclosure is not confined to such facts as are within the actual knowledge of the assured. It extends to all material facts which he ought in the ordinary course of business to have known, and he cannot escape the consequences of not disclosing them on the ground that he did not know them. This was stated by Cockburn, J. in Proudfoot Vs. Montefoire. There is however no duty to disclose facts which the assured did not know and which he could not be reasonably expected to know at any material time. In Joel Vs. Law Union Insurance, Fletcher-Moulton stated: "But the question always is; was the knowledge you possess such that you ought to have disclosed it? Let me take an example. I will suppose that a man, as is the case with most of us, occasionally had a headache. It may be that a particular one of these headaches would have told a brain specialist of a hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now, no reasonable man would deem it material to tell an insurance company of all the casual headaches he has had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know" (Baker, Mellors , Chalmers, & Lavers, 2005).

*3.4.2 Agent's knowledge imputed to Principal*

If the proposed assured employs an agent to represent him during the negotiations leading up to the policy, it is the duty of the agent to disclose to the insurers all material facts which are within his knowledge, however acquired, or which ought to have come to his knowledge in the ordinary course of business. The Marine Insurance Act(Cap 390) provides that: "where an insurance is effected for the assured by an agent, the agent must disclose to the insurer every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known, or to have been communicated to him…" Any failure to discharge this duty, whether by non-disclosure or by misrepresentation entitles the insurer to avoid the policy as against the proposed assured, since he has delegated the duty of disclosure to his agent and is responsible for the manner in which it is performed.

*3.4.3 What are material facts?*

The English courts developed various tests which have been adapted by Kenyan courts in order to ascertain what facts are regarded as material. The test which is usually applied is whether non-disclosure of the facts would influence the judgement of a "prudent" insurer concerning the risk in question – though in some cases the term "reasonable" has been substituted for "prudent". In no case is it relevant to consider whether the non-disclosure would influence the particular insurer concerned or whether the assured himself thought that the facts were material. In Joel vs. Law union & crown insurance, Fletcher-Moulton L.J. stated: "The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so …your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question. It is no excuse that you did not recognize it to be so".

*3.4.4 The test of "prudent insurer"*

As far as Marine insurance is concerned, S18(2) of the Marine Insurance Act (cap 390) provides that, "a circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk". In Associated Oil Carriers Ltd Vs. Union Insurance Society of Canton Ltd (1917), Atkin.J. stated; "…. there seems no reason to impute to the insurers a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intellingent insurers carrying on business in that market at that time". The only test of materiality of afact is whether the non-disclosure of the fact would influence a prudent insurer. Whether it would influence the particular insurer concerned is irrelevant. In Zurich general accident and Liability Insurance Vs. Morrison, Mackinnon L.J stated; "What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium, and if this be proved it is not necessary farther to prove that the mind of the actual insurer was so affected. In other words, the assured could not rebut the claim to avoid the policy because of a material representation by a plea that the particular insurer concerned was so stupid, ignorant or reckless, that he could not exercise the judgement of a prudent insurer and was in fact unaffected by anything the assured had represented or concealed'. It is also the rule that the assured's opinion as towhether the fact not disclosed is material is irrelevant. In Lindenau Vs.

 

Desborough(1928), Bayley.J.stated; "The proper question is whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material". This rule is illustrated by the decision in Godfrey Vs. Brittanic Assurance Co. ltd (1963) in which the facts briefly were as follows: *The assured under a life policy had been told that he might have minor kidney trouble and should take care. Later he was told that the kidney condition was unchanged and that an X-ray showed lung infection which would probably clear up with treatment. He also suffered from attacks of pharyngitis. None of these facts was disclosed to the insurance company when the proposal was signed because the proposed assured did not deem it necessary to tell the insurers about them.* It was held that these facts were material facts and the company would avoid liability under the policy, because the assured, as a reasonable man without any specialist knowledge, should have appreciated that he possessed knowledge of health which was of materiality to the company. Whether a particular fact is material depends upon the particular circumstances of the particular case. It does not necessarily follow that because a fact has been held to be immaterial in one case, a similar fact is not material in another. At the same time, similar circumstances may be assumed to be equally material or immaterial whatever the nature of insurance. The question is one of fact to be decided, if necessary by the judge hearing the case after receiving relevant evidence.

*3.4.5 Facts which need not be disclosed*

Facts which would in ordinary circumstances be material, may become immaterial in the special circumstances of the case; and the assured is then under no obligation to disclose them. Facts which may thus become immaterial may be grouped under the following classes: Facts which are known to the insurers or which they may reasonably be presumed to know, Facts which they could have discovered by making enquiry, Facts as to which they waived information, Facts tending to lessen the risk, and Facts the disclosure of which is unnecessary by reason of a condition(ref. S18(3) of the Marine Act, Cap 390).

*3.4.6 The effect of Non-Disclosure*

In Carter Vs. Boehm(1966),3 Burn 1905, which was a case involving marine insurance, it was held that a failure on the part of the assured to disclose a material within his actual imputed knowledge renders the policy voidable at the option of the insurers. This is so whether the failure to disclose is attributable to fraud or carelessness or inadvertence or indifference or mistake, or error of judgment or even failure to realize that the fact is material. Ignorance of a fact which he ought to have known and, hence, disclosed, will also render the policy voidable at the option of the insurers. As far as marine insurance is concerned, S18(1) of the Marine Insurance Act states that, "Subject to this section, the assured must disclose to the insurer, before the contract is concluded ,every material circumstance which is known to the assured; and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him; and if the assured fails to make such disclosure, the insurer may avoid the contract".

*3.4.7 Misrepresentation*

A representation is a statement of fact made by one party to the contract (the representor) to the other party (the representee), which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is a representation that is not true. A statement of belief or opinion as to a particular fact is not a representation. At common law, a misrepresentation may be: Fraudulent – If it was made knowingly, recklessly, careless, whether it be true or false or without belief in its truth; Derry Vs. Peek, Honest – if the maker honestly believed it to be true; Derry Vs. Peek.

> *A misrepresentation whether fraudulent or honest, renders a contract voidable at the option of the person to whom the misrepresentation was made; Derry Vs. Peek. This applies equally to insurance contracts in cases where representation had been made by one of the parties during the negotiations with a view of inducing the other party to enter into the contract.*

**3.5 Questions and Answers**

The insurers may at any time during the negotiations ask the assured questions as to any matters upon which they require information. In practice, a list of printed questions in the proposal form is usually submitted to him to answer in writing. In addition, he may be asked other questions on specific matters not covered by the questions on the proposal form. Such questions may be put and answered in writing or verbally as in Joel Vs Law Union & Crown Insurance where answers to questions put by the medical examiner were written down by him and signed by the proposed assured.

*3.5.1 The effect of the questions and answers*

In Dawsons Ltd Vs. Bonnin(1922),2 AC 413, it was held that , notwithstanding the questions that the insurers asked, the Common Law duty of disclosure remains on the proposer and he must disclose material facts which are not covered by the questions. However, Scrutton. L. J observed in Newsholme brothers Vs. Road Transport and General Insurance Company Ltd (1929), 2 KB 356 that, "The insurance companies also run the risk of the contention that the matters they did not ask questions about are not material; for, if they were they would ask

 

questions about them". On the other hand: "It is unquestionable plain that questions in a proposal form may be so framed as necessarily to imply that the underwriter only wants information on certain subject matters, or that within a particular subject matter, their desire for information is restricted within the narrow limits indicated by the terms of the question, and , in such a case, they may dispense the proposer from what otherwise at common law would have been a duty to disclose everything material".(per Asquith. L.J in Schoolman Vs. Hall. (1951) 1 Lloyds Rep 139 CA). An example of this effect of the questions is to be found in Jester Barnes Vs. Licences and General Insurance Co.Ltd (1934), 49 LI Rep 231, where Mackinnon, J stated (orbiter), that if an insurance company had asked a proposer the question, "Have you or your driver during the past 5 years been convicted of any offence?" and he had said "NO", and that was true, he would have come without any hesitation to the conclusion that the company was not entitled after asking that question and receiving the true answer, to take it to mean that he had failed to disclose that he had been convicted 8 years ago, and that that was a material fact. The effect of the proposers answers will depend upon whether there is or there is not a "basis" clause in the proposal form: *Where there is a basis clause* - The result of the presence of a basis clause in a proposal form is to render irrelevant any question either of the materiality of the information given therein or the honesty or care with which it is given. If the answer given is inaccurate, the insurers are at liberty to repudiate the policy. In addition, the proposer remains under the common law of duty to disclose material facts which are not specifically covered by the proposal form. The effect of a basis clause is illustrated by Dawson Ltd Vs. Bonnin (House of Lords).Giving the lead judgment, Jackson LJ found that inaccurate statements about the identity of the builder, in the proposal form completed by the claimant's agent, had become warranties forming the basis of the policy. He confirmed that earlier authorities established the principle that, where a proposal form contains a "basis of contract" clause, the proposal form has contractual effect (even if the policy contains no reference to it), and all statements in the form constitute warranties on which the insurance contract is based. Jackson LJ also held that:

- *Even though the first sentence of the declaration in the proposal form stated that the statements were true to the best of the proposer's knowledge and belief, this did not qualify the "basis of contract" provision in the second sentence. Therefore, the claimant had warranted that the named company would be the builder.*
- *Far from curtailing the insurer's right to avoid for misrepresentation or restricting the warranties or the "basis of contract" clause in the proposal form, condition 7 (which made the policy voidable for misrepresentation with intention to defraud) conferred additional express rights on the insurers.*

He concluded that the policy was void due to the misstatement concerning the builder, in the proposal form. Further, since the insurers were providing cover against the risks of insolvency or defective work of an identified builder, only that builder's work and insolvency were covered.

**3.6 Construction of the policy**

The construction or interpretation of a policy of insurance is a question for the courts. When words in a policy have once been judicially interpreted, they will be construed in the same way should there meaning be an issue in a subsequent case. But when the words have not been previously interpreted, the court is guided by certain principles of general application. The size of print in insurance policy is immaterial. The principle rules of construction which have been developed by the English courts and at the common law are:

*3.6.1 The Intention of the parties must prevail* - The primary rule of construction is that the intention of the parties must prevail. This intention is to be looked at on the face of the policy, including any documents incorporated therewith, such as the proposal, in the words which the parties have themselves chosen to express the meaning.

*3.6.2 The whole of the policy must be looked at* - In Hamlyn Vs Crown Accidental Insurance Co. Ltd [1893] 1Q. B 750. Lopes, L.J stated, "The policy must be read in the way in which a person of ordinary intelligence would read it, and in construing this particular clause, we must not confine our attention to that clause but must look to the whole of the policy." In this case the insured had affected a policy against "any bodily injury caused by violent, accidental, external and visible means". A clause exempted the insurance company from being liable in respect of injuries arising from "natural disease or weakness, or exhaustion consequent upon disease". He stooped to pick up a marble which had been dropped by a child, and dislocated the cartilage of his knee. The insurance company contented that there were no external or visible means which caused the accident, and that it was therefore not liable. It was held that the word, "external" was to be contrasted with "internal" causes of injury, such as disease, mentioned in the clause above, and so the injury was caused by external means and the insured would recover.

*3.6.3 The written words will be given more effect than the printed words* – An insurance policy sets out the terms and conditions of the contract in a standard printed form. But to this form, the parties may have added further words and clauses either in writing or in type-script. The question then arises as to what is the relation between the written and the printed words in the policy. The courts have evolved the rule that both the printed and the written words must be taken into consideration, but, should there be a conflict between the printed and the written clauses, greater consideration will be paid at the written clauses. In Robertson V French (1803) 4 East 130, Ellenborough L.J stated, "The only difference between policies of assurance and other instruments in this respect is that the

 

greater part of the printed language of them being invariable and uniform has acquired from use and practice, a known and definite meaning and that the word supper added in writing…. are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than do the printed words. In as much as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to the case and that of all other contracting parties upon similar occasions and subjects".

*3.6.4 The grammatical construction will be adapted* - The general rule is that the grammatical meaning of the words used in the policy will be adapted by the court if it is possible to do so. In Price & Co. Vs. VAI Ships' Small Damage Insurance Association (1889) 22Q.B.D 580 Lord Esher, M.R. stated: "Now, to say that the language of these Lloyd's policies can be construed according to strict grammar is as has often been observed, next to impossible. The phraseology used in them is in many respects regardless of grammar, but the meaning of it has been understood for many years among ship owners and mercantile men in a certain sense. Still, one must examine the language of this memorandum or warranty, and construe it, having regard, as far as possible, to ordinary rules of grammar". Obvious grammatical errors may be corrected , as in Glen's Trustees Vs. Lancashire & Yorkshire Accident Insurance (1906) 8 F (ct of SBSS) 915, where the word "not" was struck off from the printed clause of an accident insurance, and immaterial blanks and surplusage rejected.

*3.6.5 The words are to be construed in their ordinary meaning* - In Jason Vs. British Traders' Insurance Co. Ltd (1969)/Lloyd's Rep 281, a personal accident insurance case, Fisher. J stated, "A policy of insurance is subject to the same rules of construction as any other written contract. The words used in it must be given their plain, ordinary meaning in the context of the policy looked at as a whole, subject to any special definitions contained in the policy". This statement contains the basic rule which has constantly been stated by judges in a variety of ways and is illustrated by decisions in the following cases; Leo Rapp Ltd Vs McClure (1955)/Lloyd's Rep 282 and also Thompson vs Equity Fire Insurance Co (1910) AC 592.

*3.6.6 The meaning may be limited by the context* - The meaning of a word is to be ascertained with reference to its context and may be restricted or modified thereby. This may be under the "Ejusdem Genesis" rule or under the rule concerning general words followed by words of limitations as follows:

- *The "Ejusdem Generis" Rule* - Where specifications of a particular things belonging to the same genus preceed a word of general significance, the latter word is confined in its meaning to things belonging to the same genus and does not include things belonging to a different genus.
- *The "Contra Proferentem" Rule* - This rule of construction, stated in full, means 'verba chartarum forties accipiuntur contra proferentem'. It has been stated in a number of cases and amounts to the proposition that if a phrase used in an insurance policy is ambiguous, the ambiguity will be construed against the insurers who are the authors of the document.

## 4. Conclusion

Insurance contracts are legal agreements with salient aspects that make them unique and complex to most prospective insurance consumers, thus the need to demystify them. Right from policy inception throughout the currency of the insurance period until possible launching of a claim, great care and informed decisions must be made. Observation of the fundamental insurance principles such as Uberrima Fides is of paramount importance. Construction and issuance of insurance policy documents must be duly done, else, rules such as Contra proferentum, may be invoked to the detriment of the very insurers.

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